

PROPOSALS
FOR
AMENDING THE LAW
CONCERNING
TAILZIES
IN
SCOTLAND.

EDINBURGH:

Printed by SANDS, MURRAY, and COCHEAN. 1765.

[Price Sixpence.]

Ms. A. 9. 2. 64. 7

Ms. A. 9. 2. 64. 7

Ms. A. 9. 2. 64. 7



Ms. A. 9. 2. 64. 7

Daniel B. Fearing
Newport R.I.

Ms. A. 9. 2. 64. 7

Ms. A. 9. 2. 64. 7

Ms. A. 9. 2. 64. 7

Ms. A. 9. 2. 64. 7

Ms. A. 9. 2. 64. 7

P R O P O S A L S

F O R

Amending the Law concerning
TAILZIES in Scotland.

WHEREAS, by an act of parliament passed in Scotland in the year 1685, with a view to the preservation of families, it is statuted and declared, That it shall be lawful for his Majesty's subjects, to tailzie their lands and estates, and to substitute heirs in their tailzies, with such provisions as they shall think fit: And whereas, in pursuance of the powers given by the said act, but contrary to the purpose and intention thereof, many tailzies have been made, containing clauses inconsistent with the cultivation and improvement of the country, and, at the same time, restraining the heirs of tailzie from exercising the necessary powers over the estate: Therefore, and in order to prevent the accumulating and perpetuating of overgrown estates in particular families, and the tailzieing of small estates, the rents whereof are not suf-

A

ficient

ficient to support an honourable representation of the family, it is proposed,

Provisions
to wives,
husbands,
and chil-
dren.

I. THAT from and after the day of it shall be lawful to every heir of tailzie of any land-estate lying within that part of Great Britain called Scotland, to provide his wife, or the wife of his apparent heir; or if the estate is possessed by a female heir, to provide her own, or her apparent heir's husband, respectively, in a liferent, by way of locality only; providing the same do not exceed one third of the free rent of such estates, after deduction of former liferent-provisions, and of the interest of such debts, real or personal, as shall then be chargeable on the estate: And, in like manner, to provide their younger children, or those of their apparent heirs, in the whole, in an yearly liferent locality, not exceeding a third part of the free rent of the estate; which shall be redeemable by the granter's heir of tailzie on payment of ten years purchase of the said locality: And the heir shall also be intitled to relief of the foresaid provisions, out of any separate estate, real or personal, that belonged to his predecessor,

predecessor, by whom the tailzied estate was therewith charged and burdened.

II. THAT it shall be lawful to every heir of tailzie, to grant leases of all, or any part of the lands or heritages contained in such tailzie, for any number of lives not exceeding three lives, or for any term of years not exceeding two nineteen years, and the life of the tackfman who shall be in possession at the expiry of the said space: And also, it shall be lawful to grant feu-rights of any part of the lands contained in the tailzie, with the ordinary and usual clauses contained in feu-rights by the law and practice of Scotland, which shall be valid and effectual to the receivers thereof: Providing always, that the tacks or leases shall be granted for a rent or tack-duty not under what the lands do pay at the date thereof; and also, that the feu-duties shall not be under the rent payable by the tenant at the time; and that the feu-duties shall be wholly payable in victual, to be computed at the usual value in the country, although the rent before feuing may have been payable in money; and that the tackfman and feuer shall be taken bound to pay a year's rent

Leases and
feus.

to

to the heir in possession of the estate at the end of every nineteen years; and there shall be no other *duplicando* of the feu-duty at the entry of the heirs.

PROVIDING also, that no such tack or feu-right, nor any liferent granted to wives or husbands, nor provisions to children, shall affect the manor-place where the family have usually made their residence, nor a reasonable part to be set aside for policy at the sight of the court of session; but that the same shall be free of such burdens, and shall not be set in tack for longer time than for the lifetime of the granter: And also providing, that the superiorities of all feus granted in virtue hereof, shall remain with the tailzied estate unalienable, in all time coming, and shall be excepted from the power given by the act 20^o Geo. II. to heirs of tailzie to convey their superiorities to their vassals.

Rule for
debts.

III. THAT in order to prevent eviction of the tailzied estate, or any part thereof, for debts contracted by the maker of the tailzie, or which, upon any other account, may be chargeable on the estate, it shall be lawful

lawful to the heir of tailzie in possession, to sell, by public roup, such part of the tailzied lands as may be sufficient to satisfy and pay such debts and incumbrances: Providing that such sale shall be made by authority of the court of session, upon a summons of sale, against the subsequent heirs on life at the time, or their parents or guardians, if they are under minority; and that the price shall be applied, by the direction of the said court, in payment of the said debts, and for defraying the expence of the sale: And by such sale, and payment of the debts for which it was made, the purchaser shall be secured in the absolute and irredeemable property of the lands, and not liable to any challenge upon the prohibitive, irritant, or resolute clauses in the tailzie; nor shall the same operate any irritancy, contravention, or forfeiture, of the right of the heir, in respect of his making such sale, in the terms, and to the purposes above mentioned.

IV. THE same rule may be observed, when it becomes expedient to excamb a part of the lands with other lands that are more commodious to the bulk of the tailzied

Excambion

zied estate, or to sell the one, and apply the price to purchase the other. If the expediency of such sale or excambion is agreed upon by the next heir in possession, and the two nearest presumptive heirs, who are not descended of his body, and who are majors, and within the kingdom at the time, the same may be properly executed by directions of the court of session, upon a process brought against all the heirs on life, and the parents or guardians of such as are minors, in the same manner as has been provided in the case of lands to be sold for payment of debts.

Tailzies
not effec-
tual unless
recorded,
and the
clauses in-
sert in sei-
fins also put
on record.

V. AND in order to prevent creditors from being insnared by limitations in entails which have not been published as the law directs, it is proposed, That no entail, made or to be made, shall have any effect against creditors, purchasers, or any other singular successors, until such time as the tailzie shall not only be recorded in the register of tailzies, according to the directions in the said act 1685; but also until such time as infestment shall be taken thereon, and all the prohibitive, irritant, and resolute clauses be ingrossed in the charters, and

and instruments of seisin, and the seisms recorded in the proper register: And that if any person shall contract with an heir while the requisites of the act 1685, and of this act, have not been followed out, such debts or purchases shall not be liable to any challenge, upon pretence of private knowledge of the tailzie; but shall be equally effectual as if no such tailzie had been made.

VI. AND in order to make tailzies fully effectual, according to the true intent thereof, it is proposed, That it shall be declared lawful to all heirs of tailzie, whether near or remote, to declare the irritancies thereof, against the heir in possession; and if the pursuer prevail, he is to be intitled to double costs of suit. But the irritancy declared, shall not prejudice the right of the contravener's creditors, to affect by diligence the rent of the estate during the life of their debtor. And that the contravention of the provisions in entails shall only operate an irritancy or forfeiture of the right of the person contravening, and shall not affect any other heir, though descended of his body.

Declarators of contravention, to whom competent, and the effect thereof.

Recom-
pence al-
lowed to
the heir for
improve-
ments.

VII. Where an heir of tailzie, by inclo-
sing, or otherwise, improves the value of
any part of the tailzied estate, other than
the mansion-house, and policies adjacent
thereto, his assignees or creditors shall be
intitled, within the space of one year after
his death, to demand from the succeeding
heir a tack of the land so improved, for the
space of two nineteen years, and a lifetime,
for payment of the old rent paid by the te-
nants before improvement, and a year's
rent, by way of grassum, at the end of
each nineteen years: But this tack to be re-
deemable from such assignees or creditors
on payment of twenty years purchase at
any time within seven years after the grant-
ing thereof, but not afterwards.

No tailzie
to extend to
urban tene-
ments,

VIII. That no urban tenement shall be af-
fected by any tailzie, either made or to be
made; but the same shall belong to the
heir of tailzie, as an unlimited fee, not-
withstanding any limitations, irritant or
resolutive clauses; which, as to such lands,
shall have no effect.

Nor to
lands above
the extent
of 18,000 l.
Scots of va-
lued rent,

IX. That if any estate, limited by an en-
tail made or to be made, shall exceed
L. 18,000

L. 18,000 Scots of valued rent, then the surplus of the estate so tailzied, shall, from and after the day of belong to the heirs of tailzie, as a fee unlimited: And it shall be competent to any heir in possession at the time, by a process before the court of session, in which all the subsequent heirs of tailzie on life shall be called, and the parents or guardians of such as are minors, to ascertain particular lands to the extent of L. 18,000 Scots of valued rent, over and above the manor-place and policies; and to declare, that the same are affected by the limitations in the tailzie; and that the remaining lands, though therein comprehended, shall, in all time coming, belong to the heirs of tailzie in fee unlimited, and shall not be affected by any of the prohibitive, irritant, or resolute clauses in the tailzie; but shall be at the full and absolute disposal of the heirs, and affectable by their debts and deeds, in the same manner as if such lands had not been ingrossed in the tailzie.

X. THAT no estate, whereof the valued rent is less than L. 2000 Scots, shall be affected by any tailzie, either made or to be made;

Nor to
lands under
the valued
rent of
2000 l.
Scots.

made; but the same shall belong to the heirs of tailzie as an unlimited fee.

Act 1685 to
subsist so
far as not
altered.

XI. THAT nothing in such act shall be construed to repeal or alter the act 1685, in any of the articles, clauses, or provisions thereof, other than those before mentioned; but that the said act 1685 shall remain in full force as to all such articles, clauses, or provisions, concerning which no provision is hereby made, in the same manner as they were before this act was made.

Endurance
of tailzies.

It has been proposed, That no tailzie should subsist after the death of the longest liver of all the heirs who were on life when the tailzie was made. But this is the same as to propose, That no tailzie shall ever be made in Scotland; as no man there will chuse to execute a settlement, which is to limit only his immediate sons who are in life at the time, and leave all the remoter heirs, with whom he is less connected, at liberty to dissipate the estate, as soon as it devolves to them free and disincumbered, in virtue of the restraints and disabilities which he had laid upon his sons, and the other *heredes prædilecti*, whom he saw and knew

at

at the time. Such tailzies, devised to last for one generation only, are indeed a form made use of in some countries for executing marriage-settlements: But they will never be received for that purpose in Scotland, which has immemorially been possessed of another usual and established form of providing wives and children at marriage, by a different kind of settlement, called a *contract of marriage*; which is much better suited to the constitution of this country, and the temper of the people, than the tailzies now proposed would be. For, by such contracts, the father is left in the full property of his own estate, so as to sell or burden it with debts contracted for a valuable consideration; but he is limited, by the *bona fides* implied in the contract, from doing any gratuitous or arbitrary deed, to the disappointment of the succession covenanted to the issue of the marriage. This is found by experience to be a sufficient security to the children, without divesting the father of his property, or restricting him to a disferent; which would deprive him of many opportunities of doing good to his children and his family, that still remain with

with him notwithstanding the implied limitation in the contract of marriage.

THE subjects of this country have long found themselves happy under this kind of settlement, which appears to them from experience to be the best that can be devised for giving children a reasonable security for the succession, without taking away the dependence they ought to have on their parents, so necessary for their proper education and future happiness. No man here will consent to restrict himself to a life-tenement of his own estate; nor is this required from any man who enters into a marriage-settlement.

THE import of *contracts of marriage*, as also that of *tailzies* under the act 1685, are, by long experience, well known in this country; and every question almost that can occur has been ascertained by decisions of the Court of Session, affirmed by the House of Lords. Such settlements are therefore in no danger of giving rise to new disputes. But if a new kind of settlement were to be introduced, unknown to the law and practice of this country, and founded on principles which bear no analogy

logy to it, it is not to be foreseen what confusion would thence arise. If people are obliged to settle their lands in terms of which they know not the effect, the intention of the maker must often be disappointed; and in such frequent jarrings betwixt the words and the intention, the judgments of the best courts must be attended with some uncertainty.

THE chief objection now made to the present tailzies, is their perpetuity. But this is not the circumstance in which the people have hitherto thought themselves aggrieved. The hardships complained of have been, the want of reasonable powers to provide wives and children; to clear the estate of debts affecting it; the accumulating great estates without end or bounds, so as to exclude the cultivation and improvement of the country, by disabling heirs to grant feus, or long leases, without which it cannot be carried on. These inconveniencies are meant to be remedied by the amendments above proposed; and if, by these or others, tailzies can be brought to such a model as the heirs may find themselves easy under them, being possessed of all rational powers, men who
have

have at heart to prolong the independent subsistence of their families, so natural in this country, will not wish to see a limitation put to their endurance.

At the same time, if it should be thought to be inexpedient that tailzies should be extended through many successive series of heirs, descended perhaps of different families, this may be remedied, by limiting tailzies in time coming to the heirs of blood of the maker, or even to those descended of him, or his father, or grandfather; allowing the same still to be extended to heirs-male collateral, of whatever degree, as this is the chief destination which is most wished for by many families, for obvious reasons.

F I N I S.